

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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LUIS ARMANDO BENITO, RAYMOND)
BISSAILLON, BEOP CHUON,)
NORMAN TATE, CAROLS PADILLA)
VELASCO, ELENA WOODARD, STEVE)
AYRES, JAMES BAILEY, CESAR)
COVELLI SR., VALERIE DUNLAP,)
PERRY ESCOBAR, FIROUZEH)
FOROUZMAND, MARLEN GARCIA,)
ANTOINETTE GILL, ROBERT)
GRIEBEL, DORINE HORVATH, LUCH)
LOU, MATTHEW MOORE, MARIA)
PARRA, MARK SANDERS, ANTHONY)
SUGGS, AND MICHAEL ZANG.)

Plaintiffs,

v.

INDYMAC MORTGAGE SERVICES, a)
Division of ONEWEST BANK, FSB,)

Defendants.

2:09-CV-001218-PMP-PAL

ORDER

On May 18, 2010, the Court conducted a hearing regarding Plaintiffs' fully briefed Motion for Class Certification (Doc. #16).

By this motion, Plaintiffs seek to certify four proposed classes for injunctive and declaratory relief pursuant to Rule 23(a)(b)(2) of the Federal Rules of Civil Procedure. Proposed Class A consist of all persons in Nevada who signed a written loan contract with Indymac Bank FSB "Indymac" on or after 2003 for which the lender knowingly made loans without first determining the borrower had the ability to repay. Proposed Subclass A,

1 consist of persons in Nevada who signed a written loan contract with Indymac on or after
2 2003 through 2007, wherein Defendant OneWest, as successor to Indymac, knowingly
3 made loans by virtue of the presumed equity in the property, without first determining that a
4 borrower had the ability to repay the loans, in violation of NRS § 598D.100. Proposed
5 Subclass B consist of all persons in Nevada who signed a written loan contract with
6 Indymac on or after 2007 wherein OneWest, as successor to Indymac, knowingly made an
7 unlawful home loan without using any commercially reasonable means to determine the
8 borrower had the ability to repay the home loan, in violation of NRS § 598D.100. Proposed
9 Subclass C consists of all OneWest customers who have been sued by OneWest whereby it
10 sought wrongful foreclosure and/or wrongful eviction, by utilizing the laws and judicial
11 system of the State of Nevada in violation of NRS § 80.55.

12 Plaintiffs' Amended Complaint (Doc. #14) alleges nine separate claims for relief.
13 Essentially, Plaintiffs' claims revolve around the allegation that they had adjustable rate
14 mortgages (ARM) with Indymac, and that when their ARM's came due, their mortgage
15 payments doubled. Plaintiffs contend Indymac failed to inform Plaintiffs their mortgage
16 payments could increase to such a degree. Plaintiffs also allege that when they sought
17 financial assistance from OneWest, OneWest refused to negotiate and began foreclosing on
18 Plaintiffs' properties even though OneWest is not registered to do business in Nevada and
19 has no registered agent in Nevada. The parties have agreed that, at least until the motion for
20 class certification now before the Court is decided, OneWest will not initiate foreclosure
21 proceedings against any named or potential Plaintiff with properties located in Nevada, so
22 as to avoid constant amendment of Plaintiffs' Complaint.

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I. CLASS CERTIFICATION

The Court may certify a class under Federal Rule of Civil Procedure 23(a) only if:

(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

In addition to these requirements, a plaintiff also must show it has satisfied at least one of the three conditions in Rule 23(b). Here, Plaintiffs rely only upon Rule 23(b)(2), which requires a party seeking certification to show the party opposing the class has acted or refused to act on grounds generally applicable to the class thus making appropriate injunctive or declaratory relief with respect to the class as a whole. The party seeking certification bears the burden of showing requirements of Rule 23 are satisfied. Dukes v. Wal-Mart, Inc., 509 F.3d 1168, 1176 (9th Cir. 2007).

A. Class Definition

Although not technically a Rule 23 requirement, definition of the class is a key consideration at the certification stage. Rule 23(c)(1)(B) requires an order certifying a class action to “define the class and the class claims, issues, or defenses.” Defining the class is “of critical importance because it identifies the persons (1) entitled to relief, (2) bound by a final judgment, and (3) entitled under Rule 23(c)(2) to the ‘best notice practicable’ in a Rule 23(b)(3) action. The definition must be precise, objective, and presently ascertainable.” Ann. Manual For Complex Litig., § 21.222. Generally, it is inappropriate to define a class in such a way that class membership cannot be identified until the merits are resolved. See Ann. Manual For Complex Litig., § 21.222; Hagen v. City of Winnemucca, 108 F.R.D. 61, 63-64 (D. Nev. 1985). “An identifiable class exists if its members can be ascertained by reference to objective criteria.” Ann. Manual For Complex Litig., § 21.222.

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1 OneWest argues the class is not readily identifiable because, as defined, each class
2 would require a finding that OneWest violated Nevada law by knowingly making the loan without
3 determining the borrower had the ability to repay. Thus, the class member in Class A and
4 Subclasses A and B would not be identifiable until after a trial on the merits. As to Subclass C,
5 OneWest argues that class likewise is identifiable only after trial because it states the foreclosures
6 were “wrongful,” which is a merits question.

7 Essentially, Plaintiffs defend this point only as to Subclass C. Plaintiffs respond
8 that a class is readily identifiable because one would only have to conduct a search of
9 pending cases in Nevada state court in which OneWest is seeking to foreclose to identify
10 class members. Plaintiffs argue that because OneWest is not registered to do business in
11 Nevada and has no registered agent here, it is not entitled to use the Nevada judicial system
12 to foreclose on any property in the state. Thus, any foreclosure by OneWest in the state
13 would be wrongful regardless of whether the borrower is in default.

14 OneWest does not respond to this argument about not being registered to do
15 business in Nevada, and thus not qualified to use the Nevada judicial system to foreclose or
16 evict. Proposed Subclass C would be a readily ascertainable class, as it would be
17 identifiable by the objective criteria of any attempt by OneWest to use the Nevada judicial
18 system to foreclose or evict. Unlike proposed Class A and Subclass A and B, it would not
19 require any inquiry into the merits of each case prior to defining the class because Plaintiffs
20 contend OneWest is ineligible to use the Nevada judicial system by virtue of OneWest’s
21 status, or lack thereof, not because of anything unique to any particular borrower. Thus the
22 Court finds proposed Subclass C is a readily ascertainable class.

23 However, Plaintiffs do not sufficiently identify an ascertainable class for the
24 other proposed subclasses. Plaintiffs appear to suggest that the mere fact of being a
25 borrower on an Indymac loan would suffice. However, that is not how the proposed classes
26 are defined. Identification of a class member for Class A, Subclass A, and Subclass B

1 would require a finding on the merits that OneWest (via its predecessor Indymac)
2 knowingly made loans without first determining the borrower had the ability to repay. A
3 determination of who falls into that class could not be made without a merits determination
4 first, particularly as to the “knowingly” requirement. Consequently, there is no readily
5 ascertainable class for Class A, Subclass A, or Subclass B, and class certification for these
6 classes must be denied. As discussed below, the same problem exists for other parts of the
7 class certification analysis for proposed class A and Subclasses A and B.

8 **B. Rule 23(a)**

9 **1. Numerosity**

10 Rule 23(a)’s “numerosity” requirement is met where the party seeking
11 certification shows the class is “so numerous that joinder of all members is impracticable.”
12 Fed. R. Civ. P. 23(a)(1). “[I]mpracticability’ does not mean ‘impossibility,’ but only the
13 difficulty or inconvenience of joining all members of the class.” Harris v. Palm Springs
14 Alpine Estates, Inc., 329 F.2d 909, 913-14 (9th Cir. 1964) (quoting Advertising Specialty
15 Nat’l Ass’n v. FTC, 238 F.2d 108, 119 (1st Cir. 1956)).

16 OneWest concedes it has many loans in Nevada, but argues there has been no
17 showing on this prong and that Plaintiffs have not been acting like this is a class action,
18 instead joining plaintiffs as they go along. Plaintiffs respond that they have done so
19 because that is what the parties agreed to do to avoid multiple amendments to add parties.
20 The Court finds Plaintiffs’ have met the “numerosity” requirement.

21 **2. Commonality**

22 Rule 23(a)’s second requirement is that common questions of fact or law exist.
23 The class need not share in common all questions of fact and law. Dukes, 509 F.3d at 1177.
24 Rather, common legal issues with divergent facts or common facts with disparate legal
25 remedies may satisfy the commonality requirement. Id. “The commonality test is
26 qualitative rather than quantitative - one significant issue common to the class may be

1 sufficient to warrant certification.” Id. The Ninth Circuit construes the commonality
2 requirement “permissively.” Staton v. Boeing Co., 327 F.3d 938, 953 (9th Cir. 2003).

3 Plaintiffs argue common questions of law and fact exist, including whether the loan
4 agreements comply with Nevada law, whether Indymac knowingly made loans without
5 determining the borrower’s ability to repay, whether OneWest has refused to negotiate
6 modifications, whether OneWest has used the Nevada law to evict people in violation of Nevada
7 law, and the class seeks common injunctive relief. OneWest argues there is no commonality
8 because each loan would have to be examined to determine whether Indymac knowingly
9 made the loan without determining the borrower’s ability to repay.

10 The court finds commonality is lacking for Class A and Subclasses A and B.
11 Even if Plaintiffs could show Indymac used a standard loan form and they have presented
12 no such evidence, a standard form does not establish that in each case Indymac knowingly
13 made the loan without determining the borrower’s ability to repay. That would require an
14 individualized determination in each case. Likewise, there is no common question as to
15 OneWest’s alleged refusal to negotiate modifications. OneWest has presented evidence that
16 Plaintiffs have had somewhat different experiences in relation to modification. Some have
17 applied and been denied, some have been offered a modification which they rejected, one
18 accepted the modification, and others never even requested a modification.

19 However, members of Subclass C would share a common question of law as to
20 whether OneWest wrongfully foreclosed using Nevada’s judicial procedures when it was
21 not registered to do business in the state nor had a registered agent here. Whether OneWest
22 could resort to the judicial system given its status is a question common to all members of
23 the class regardless of their individual circumstances, so long as OneWest initiated
24 foreclosure and/or eviction proceedings in Nevada state court against them.

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3. Typicality

In assessing whether a proposed class representative's claims are typical, the Court must consider whether the injury allegedly suffered by the named plaintiffs and the rest of the class resulted from the same alleged conduct of the defendant. Dukes, 509 F.3d at 1184. A class representative's claims need not be substantially identical to other members' claims. Id. Rather, typicality is satisfied if the named plaintiff's claims are "reasonably coextensive with those of absent class members" Id. (quotation omitted). Minor differences in the nature of the specific injuries class members suffered do not defeat typicality. Armstrong v. Davis, 275 F.3d 849, 868-69 (9th Cir. 2001).

Plaintiffs contend the class representatives' claims are typical of the class because they rest on similar legal arguments and each class member signed written boilerplate loan agreements pursuant to which Indymac made loans without determining whether the borrowers had the ability to repay. Plaintiffs also argue Benito's claim is typical of the class because OneWest used the Nevada judicial system to evict him without first registering to do business in the State.

OneWest argues that discovery conducted thus far shows none of the five named Plaintiffs deposed by OneWest during certification discovery falls within any of the proposed classes. OneWest argues that because it did not originate any of the loans, it cannot be liable to Class A or Subclasses A and B. Additionally, OneWest argues none of the five Class representatives are members of Subclass C because their properties have not been foreclosed and they have not been evicted.

OneWest is correct that no class can be certified under Class A or Subclasses A or B because OneWest did not originate any of the loans, and it did not assume any liabilities arising from Indymac's alleged failure to determine a borrower's ability to repay. Moreover, the named Class representatives' claims are not typical of the class even if one could be constituted because it would require individual determinations on each loan as to

1 whether Indymac made the loan knowing the borrower lacked the ability to repay.
2 Although Plaintiffs allege boilerplate loan documents were used in all cases, discovery has
3 demonstrated this is not accurate. Indeed, not all loans for named Plaintiffs even originated
4 with Indymac thus the record does not establish Indymac used a boilerplate document
5 knowing the borrower on any particular loan could not repay.

6 However, a class can be certified under Subclass C because that class is directed
7 at activities undertaken by OneWest after having taken over the loans. OneWest argues
8 there is no named Plaintiff who is in foreclosure or eviction proceedings. It is undisputed
9 that named Plaintiff Benito was foreclosed upon and evicted, however because the actions
10 are complete as to him, he's not entitled to injunctive relief, which is the only type of class
11 Plaintiffs attempt to assert right now. However, OneWest has indicated in its papers that
12 the only thing stopping it from commencing foreclosures on the other named Plaintiffs is
13 the stipulation of the parties that OneWest would not do so pending decision on the instant
14 Motion for Class Certification. Several of the named Plaintiffs are in default on their loans
15 and thus, but for the stipulation, would face foreclosure proceedings or the imminent threat
16 of foreclosure. OneWest has indicated that once this Court makes its ruling on class
17 certification, it is free to start foreclosing on any Plaintiff in default on a loan. The Court
18 finds the typically requirement is met as to proposed Subclass C.

19 **4. Adequate Representation**

20 A plaintiff shows he or she adequately will represent the class by demonstrating
21 the proposed class representative has no conflicts of interest with the proposed class.
22 Dukes, 509 F.3d at 1185. In addition to showing the named representatives have no conflict
23 with the class, the plaintiff must show class counsel is qualified and competent. Dukes, 509
24 F.3d at 1185.

25 Plaintiffs argue the Class representatives adequately represent the class because
26 Benito entered into a loan with Indymac, and Indymac made the loan by virtue of the

1 presumed equity in the property without determining Benito had the ability repay.

2 OneWest resorted to Nevada's judicial system to evict Benito from the property. Plaintiffs
3 further contend their counsel are qualified, experienced, and able to conduct the litigation
4 and there are no conflicts of interest between Benito, the other named Plaintiffs, and the
5 putative class.

6 OneWest argues that Plaintiffs' counsel is not adequate because OneWest wanted
7 to conduct stacked depositions (more than one deposition occurring at a single time) but
8 Plaintiffs' counsel refused, saying they lacked the staff to do so. OneWest thus contends
9 Plaintiffs' counsel lacks resources to conduct this case as a class action. As for the class
10 representatives, OneWest contends Benito is not an appropriate representative because he
11 lied on his loan application and he is employed by Plaintiffs' counsel. OneWest also argues
12 that because the various named Plaintiffs are in different stages of the process, they may
13 have different and possibly conflicting interests.

14 The Court rejects OneWest's argument that Plaintiffs' counsel's refusal to engage
15 in stacked depositions warrants a finding that Plaintiffs' counsel is inadequate. The Court
16 finds Plaintiffs' counsel are indeed qualified and experienced, and adequate to represent the
17 proposed Plaintiffs' classes.

18 As for adequacy of the class representatives, as discussed above there is no
19 adequate representative for any class except Subclass C. OneWest challenges Benito's
20 status as an adequate representative for Subclass C because he lied on his loan application
21 about his income, and thus there would be an individual defense against him not applicable
22 to the class. That would not affect his status as a representative of Subclass C. The only
23 issue in Subclass C is whether OneWest has a right to use the Nevada judicial system to
24 foreclose or evict when it is not registered here. Whether Benito lied on his loan
25 application will have no direct bearing on that question. OneWest argues Benito is not an
26 adequate class representative because he works for Plaintiffs' counsel. Plaintiffs' counsel

1 denies Benito works for them. Regardless, because Benito already has been foreclosed
2 upon and evicted, he would not have standing to seek injunctive relief as a representative of
3 Subclass C. Nevertheless, the other named Plaintiffs face imminent threat of foreclosure
4 and/or eviction proceedings once the stipulation in this case is lifted. OneWest has
5 indicated it will foreclose upon borrowers in default once the stipulation is lifted, which will
6 occur upon this Court's ruling on the class certification motion. Several of the named
7 Plaintiffs are in default and thus would be subject to foreclosure proceedings. Such
8 Plaintiffs' adequately represent the interest of Subclass C.

9 In sum, class certification must be denied under Rule 23(a) for Class A and
10 Subclasses A and B for lack of an ascertainable class, lack of commonality, lack of
11 typicality, and lack of an adequate representative. However, the Court finds Subclass C is
12 certifiable under Rule 23(a).

13 **B. Rule 23(b)**

14 In addition to satisfying Rule 23(a), a plaintiff also must show at least one of the
15 Rule 23(b) categories applies. Plaintiffs seek to certify only under Rule 23(b)(2). Rule
16 23(b)(2) provides for class certification where the party opposing the class has acted or
17 refused to act on grounds generally applicable to the class thus making appropriate
18 injunctive or declaratory relief with respect to the class as a whole. "Rule 23(b)(2)
19 certification is not appropriate where monetary relief is 'predominant' over injunctive relief or
20 declaratory relief." Dukes v. Wal-Mart Stores, Inc., --- F.3d ----, 2010 WL 1644259, *36 (9th Cir.
21 2010). Whether monetary relief predominates is a case-by-case inquiry. Id. The Court must
22 consider "the objective 'effect of the relief sought' on the litigation," including "whether the
23 monetary relief sought determines the key procedures that will be used, whether it introduces new
24 and significant legal and factual issues, whether it requires individualized hearings, and whether its
25 size and nature-as measured by recovery per class member-raise particular due process and
26 manageability concerns would all be relevant." Id. None of these factors is determinative. Id.

1 Plaintiffs argue Indymac/OneWest have acted in a similar manner to all members of the
2 class by engaging in predatory lending practices and then used the Nevada legal system to evict
3 without complying with Nevada law. OneWest argues that Plaintiffs have failed to show OneWest
4 acted or refused to act on grounds generally applicable to the class because OneWest did not
5 originate any of the loans at issue. Additionally, OneWest argues that the allegations that OneWest
6 made each loan knowing the borrower could not repay, that Indymac misrepresented the loans'
7 terms, or that OneWest wrongfully foreclosed cannot be demonstrated on a class wide basis, as
8 each would involve individualized inquiries. Moreover, OneWest argues Plaintiffs are not entitled
9 to certify a class under Rule 23(b)(2) because their claims for damages predominate over claims for
10 declaratory or injunctive relief.

11 As discussed with respect to the Rule 23(a) factors, Plaintiffs have not shown common
12 conduct as to all class members in relation to loan origination because whether Indymac knowingly
13 made loans without determining a borrower's ability to repay would require individual
14 determinations on each loan. Likewise, whether OneWest refused to negotiate modifications will
15 be an individual determination, as it is undisputed that OneWest in fact has offered modifications
16 to some Plaintiffs already.

17 However, the Court finds Subclass C is certifiable. OneWest has acted common to the
18 class when it seeks to foreclose and/or evict in Nevada state court while allegedly not registered to
19 do business in the state and having no registered agent here. As to this class, injunctive relief
20 would predominate for a class of individuals who had not yet been foreclosed upon or evicted, but
21 who were under threat of such litigation. They would want to stop foreclose altogether, as real
22 property is unique and damages may not remedy their harm. For those like Benito who already
23 have been evicted, money damages would be the only possible relief, and thus no class could be
24 certified for injunctive relief for a class of already foreclosed/evicted borrowers.

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II. CONCLUSION

For the foregoing reasons, the Court concludes that Plaintiffs' Motion for Class Certification should be granted only as to proposed Subclass C.

At the close of the May 18 hearing the Court inquired of counsel whether efforts were ongoing to process loan modification applications when submitted by various Plaintiffs. Counsel for OneWest advised they were, but noted it is a slow process dependent in part on each Plaintiff submitting a complete loan modification application with all necessary supporting documentation.

The Court concludes that the involvement of the Magistrate Judge assigned to this case, the Honorable Peggy A. Leen, may be helpful in bringing the parties together to streamline and expedite the process of submitting and considering loan modification applications from Plaintiffs in the action and future members of proposed Subclass C. Therefore, the Court will include in this Order a provision referring the case to Magistrate Judge Leen for such proceedings as she deems appropriate to assist the parties in this regard.

IT IS THEREFORE ORDERED that Plaintiffs' Motion for Class Certification (Doc. #16) is **GRANTED** to the limited extent that Plaintiffs' Proposed Subclass C is hereby Certified in accord with provisions of FRCP 23.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Class Certification (Doc. #16) is **DENIED** in all other respects.

IT IS FURTHER ORDERED that counsel for the parties shall forthwith meet and confer, and shall within thirty (30) days of the date of the this Order file with the Court a proposed Order for Notice of the Class Action certified herein in accord with FRCP 23(c).

IT IS FURTHER ORDERED that in accord with FRCP 23(g), Matthew Q. Callister, Esq., and Brooke A. Bohlke, Esq., of the Law Firm of Callister & Reynolds are hereby appointed as Plaintiffs' Class counsel for Certified Subclass C.

1 **IT IS FURTHER ORDERED** that within 30 days of the date of this Order,
2 counsel for Plaintiffs shall designate new representative Plaintiffs for certified Subclass C.

3 **IT IS FURTHER ORDERED** that this case is referred to the Honorable Peggy
4 A. Leen, United States Magistrate Judge for scheduling a hearing with counsel for the
5 parties to this action within the next 60 days to address the progress of processing loan
6 modification applications of Plaintiffs.

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8 DATED: May 21, 2010.

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11 PHILIP M. PRO
12 United States District Judge
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